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**Issue Date: 19 February 2003**

**CASE NO.: 2002-LHC-1655**

**OWCP NO.: 7-034688**

**IN THE MATTER OF**

**ORIAS SCHLESINGER**
**Claimant**

**v.**

**PENZOIL EXPLORATION PRODUCTION CO.**
**Employer**

**CIGNA INSURANCE COMPANY**
**n/k/a PACIFIC EMPLOYERS INSURANCE COMPANY[1]**
**Carrier**

**Appearances:**

Arthur J. Brewster, Esq.
For the Claimant

R. Scott Jenkins, Esq.
For the Employer

BEFORE: C. RICHARD AVERY
Administrative Law Judge

## DECISION AND ORDER

This is the second time this claim has been before me. At the most recent hearing on November 6, 2002, I heard the testimony of Claimant and received into

[1] CIGNA is now know as Pacific Employers Insurance Company, per Employer's letter of January 21, 2003.

evidence the following exhibits: Joint Exhibit 1, ALJ Exhibit 1, Claimant's Exhibits 1-3 and Employer's Exhibits 1-24.[2] Each party was given an opportunity to file post-hearing briefs, which they did, and this decision is based on the entire record.

In Joint Exhibit 1, the parties agreed Claimant had three accident/injuries while in the employment of Employer; they agreed on his average weekly wage on the occasion of each accident/injury and also agreed that he reached maximum medical improvement on June 1, 2001. Each of Claimant's injuries involved his left knee, for which he now has had a total knee replacement. The issues for me to resolve are as follows: (a) nature and extent of Claimant's disability; (b) if a schedule award, which average weekly wage is appropriate; (c) whether this Carrier, CIGNA, is responsible for a 15 percent disability rating increase following Claimant's 1991, surgery for which he did not file a claim; (d) credit for benefits paid following maximum medical improvement and (e) 8(f).

## Background

Mr. Schlesinger originally injured his left knee on June 21, 1975, and underwent a meniscectomy. Dr. Akins assigned Claimant a 5 percent disability rating and returned Claimant to work without restrictions. Claimant continued working until June 17, 1991, when he began to again experience pain, and underwent a tibial osteotomy. Dr. Drez gave Claimant a 20 percent disability rating. After recuperating, Claimant returned to work for Pennzoil and remained there until July 9,1997, when Dr. Drez placed Claimant on no-work status. In May 2000, Claimant underwent a total knee replacement. He reached maximum medical improvement on June 1, 2001, and has a permanent disability impairment rating to his left knee of 50 percent. Claimant has never received benefits for the 15 percent disability rating increase following his 1991, surgery. CIGNA was not the Carrier on risk at that time.

The issue previously before me was whether Claimant aggravated his knee condition by continuing to work or was his need for total knee replacement the natural progression of his 1975 accident. In my Decision and Order of February 14, 2001, (EX 20), I found that Claimant's disability was the result of his continued offshore

[2] Claimant's Exhibit 3 and Employer's Exhibits 22, 23, 24 were received post-hearing, and by letter dated December 12, 2002, Employer's counsel advised that Employer's Exhibits 2, 3, 4, 12, 14, 15 and 16 need not be considered for purposes of resolving the pending issues.

employment until 1997 because the work aggravated and accelerated his ultimate need for a knee replacement. Therefore, I found CIGNA the Responsible Carrier since they provided coverage at the time Claimant last worked for Employer in 1997. As to his 15 percent increase in disability following his 1991, surgery, for which Claimant filed no claim and received no permanent compensation, I did not rule because Claimant had not reached maximum medical improvement; however, I did find Claimant's claim for temporary total disability following his 1991 surgery to be time barred.

As stated, the claim is again before me, and on this occasion the Claimant has reached maximum medical improvement and the issues are Claimant's entitlement to a compensation award; and if a scheduled award is determined to be the appropriate remedy, whether CIGNA (who is now paying out schedule benefits for the 30 percent disability rating increase following Claimant's 2000 knee replacement) is also liable for the unpaid 1991 15 percent disability increase. [3]

## Findings of Fact and Conclusions of Law

### Schedule Award

Claimant was born May 15, 1952 and is a high school graduate. He was in the military police while he served in the Air Force and since that time has worked in the oil fields. Claimant lives in Lake Arthur, Louisiana, which he says is a small retirement community ten miles south of Interstate 10 and 12 miles from Jennings, Louisiana, where there are businesses such as Burger King and Wal Mart. Claimant has not sought but one job on his own because he was of the impression the vocational rehabilitation counselor was going to find the jobs. He testified he heard about a construction site security/gatekeeper job which he thought he could do, but when he inquired it had been filled. He takes no newspaper and has not actively sought employment.

Dr. David Drez is Claimant's treating physician. His deposition was taken post-hearing on November 21, 2002 and is Claimant's Exhibit 3 and Employer's Exhibit 22. Dr. Drez is a board certified orthopedic surgeon. He performed a total knee

[3] The Carrier on risk in 1991, CNA, was dismissed by Summary Decision dated August 2, 2002, on the grounds that Claimant was time barred from seeking recovery from that Carrier because he never filed a claim for that 15 percent increase.

replacement of Claimant's left knee on May 3, 2000, and agreed that June 1, 2001, was appropriate for the date of Claimant's maximum medical improvement. He gave Claimant a 50 percent impairment to his left extremity, 30 percent of which was contributed to the replacement. As to restrictions, Dr. Drez testified that Claimant was warned that climbing, squatting and excessive loading of the joint could cause greater wear and tear on the prosthetic components. As far as specific restrictions, he limited Claimant's lifting to 6 to 10 pounds frequently, no standing or walking continuously for more than an hour, sitting for no more than 2 hours continuously, no repetitive climbing, squatting or stooping.

Dr. Drez stating that he had no expertise in vocational rehabilitation, but he would approve any job within Claimant's outlined physical restrictions. He did not discuss specific jobs, but said he would discourage Claimant standing two hours straight, climbing a ladder or frequent lifting of more than 20 pounds. As far as 8 hours of driving, Dr. Drez said it would depend on the vehicle and tasks involved. Finally, when asked if he thought Claimant was employable, Dr. Drez responded, "There is no question about it. Yes, I do." (CX 3, p. 20).

A worker entitled to permanent partial disability for an injury arising under the schedule may be entitled to greater compensation under Sections 8(a) and (b) by a showing that he is totally disabled. *Potomac Elec. Power Co. v. Director, OWCP*, 449 U.S. 268, 277 n.17, 14 BRBS 363 (1980) (herein, "PEPCO"); *Davenport v. Daytona Marine & Boat Works*, 16 BRBS 196, 199 (1984). Unless the worker is totally disabled; however, he is limited to the compensation provided by the appropriate schedule provision. *Winston v. Ingalls Shipbuilding, Inc.*, 16 BRBS 168, 172 (1984). With the *PEPCO* exception of total disability, economic factors are not to be taken into account in calculating disability benefits for a scheduled injury.

In this instance, no one, including Claimant himself, has testified he is totally disabled. Granted, Claimant cannot return to his former employment; however, considering (1) Claimant's own testimony that he thought he could do the security job which was filled when he inquired; (2) Dr. Drez's testimony that there is "no question" of Claimant's employability; (3) Ms. Guillet's job surveys indicating the availability of employment since Claimant's date of maximum medical improvement; and (4) Claimant's total lack of diligence in seeking or applying for jobs, I find the conclusion inescapable that Claimant is not totally disabled and is limited to the compensation provided by the appropriate schedule provision.

Claimant spent six pages of his post-hearing brief either criticizing Employer/Carrier's vocational rehabilitation expert's job surveys or the manner by which she went about gathering the evidence, but neglected to focus on the fact that some of the jobs were within Claimant's limitations and Claimant had exhibited total lack of diligence on his part in pursuing employment. The Fifth Circuit has stated that an employer need only demonstrate the availability of a single job or general openings in the community. The Employer is not required to act as an agent for the Claimant in securing employment nor to actually report the jobs to Claimant himself, his physicians or a representative. Employer's burden is met when it demonstrates that with diligence on Claimant's part there were reasonable job opportunities available to Claimant.

Employer's expert, Carthy M. Guillet, gave a 97 page deposition post-hearing on November 21, 2002, and her job surveys of December 24, 2001, and October 8, 2002, as well as her retroactive survey to Claimant's date of maximum medical improvement were discussed in great detail. Despite the jobs identified and despite the fact that most, if not all, did not violate the literal restrictions placed on Claimant by Dr. Drez, Claimant inquired about only two - hardly a diligent effort on his part. In sum, the schedule applies, Claimant is not totally disabled.

Scheduled Award

In this instance, the parties stipulated, and Claimant's doctor agreed, Claimant now suffers a 50 percent permanent impairment to his left knee. I agree, and based on the clear language of *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45 (5th Cir. 1986), Employer/Carrier are responsible for the entire 50 percent permanent partial disability schedule award due Claimant, minus any monies actually paid to and received by Claimant for his 1975 5 percent disability rating.

In *Strachan*, the Court faced virtually the same scenario as this claim. Nash was a worker who arrived with an existing disability rating for which he had made no recovery. Upon further aggravating his knee and increasing his disability rating with his new employer, the Fifth Circuit agreed with the Benefits Review Board that "the aggravation rule does not permit reduction of the full compensation injury disability by an inquiry into what the worker should have or could have recovered from a past employer." (p. 519) In other words, when the aggravation rule is applied, the credit doctrine applies only to compensation actually received by the injured worker. Therefore, in this instance, Employer/Carrier must pay Claimant the full 50 percent

scheduled disability award due to Claimant, less the actually money Claimant received regarding his 1975 disability rating. Also, under the aggravation rule, Claimant's compensation rate is based on the average weekly wage of the last aggravation which increased his disability. In this instance, the parties have agreed that as of July 9, 1997, Claimant's average weekly wage was $1,036.67; therefore, it is that figure that Claimant's compensation rate should be based upon.

Section 8(f) Relief

The purpose of Section 8(f) is to prevent employer discrimination in the hiring of handicapped workers, and to encourage the retention of handicapped workers. *Lawson v. Suwanee Fruit and Steamship Co.*, 336 U.S. 198 (1949); *Director, OWCP v. Campbell Indus., Inc.*, 678 F.2d 836, 839 (9th Cir. 1982). It is also well settled that the provisions of Section 8(f) are to be construed liberally in favor of the employer. *Equitable Equipment Co., Inc. v. Hardy*, 558 F.2d 1192 (5th Cir. 1977); *Johnson v. Bender Ship Repair, Inc.*, 8 BRBS 635 (1978).

I agree with Employer, this is "almost textbook" as far as 8(f) relief is concerned, and the Director has not indicated objection. When this claim was last referred to the Office of Administrative Law Judges, the transmittal letter dated April 12, 2002 noted "Section 8(f) has been raised prematurely." Thereafter, according to Employer's Exhibit 24, an application for 8(f) relief was filed with the District Director as well as the Regional Solicitor on October 16, 2002. Subsequent to the formal hearing, by letter dated November 8, 2002, I wrote the Regional Solicitor advising him of the pending issues and inviting a post-hearing brief. On February 13, 2003, I received a facsimile of a one paragraph letter from the Office of the Solicitor asserting Employer/Carrier failed to demonstrate Claimant's permanent disability is not due solely to his most recent work injury. Consequently, I view the issue ripe for determination.

Section 8(f) of the Act provides that an employer may limit its liability for compensation payments from permanent disability if the following elements are present: (1) the claimant has a pre-existing permanent partial disability; (2) the pre-existing disability was manifest to the employer; and (3) the disability which exists after the work-related injury is not due solely to the injury, but is a combination of both that injury and the existing permanent partial disability. *Two "R" Drilling Co., Inc. v. Director, OWCP*, 894 F.2d 748, 750 (5th Cir. 1990).

In this instance the parties agreed and the evidence supports the fact Claimant injured himself while working for the same employer in 1975, 1991 and 1997. Each injury and/or aggravation occurred to Claimant's left knee and each produced a greater disability of which Employer, who continued to work Claimant, was aware. Consequently, having met each of the requirements, Employer is afforded §908(f) relief. As to the Solicitor's objection, the stacking of each disability rating obviously combined to produce a greater disability that resulted in Claimant's ultimate inability to perform his usual employment.

In *Director, OWCP v. Bethlehem Steel Corp.*, 868 F.2d 759, 22 BRBS 47 (5th Cir. 1989), the Court held that where an injury falling within the provisions of Section s 8(c)(1) and 8(c)(20) materially increases a pre-existing permanent partial disability of an employee and where the compensation due the employee on account of that subsequent injury alone exceeds 104 weeks of compensation, then whenever a credit for previous compensation paid is available to offset the amount due the employee, that credit shall first reduce the total award before there is any allocation of liabilities under Section 8(f)(1) and 8(f)(2). Consequently, under the facts in this case while I have found Employer/Carrier entitled to Section 8(f) relief, it shall apply only to those weeks in excess of 104 after a credit is first made for the actual monies previously paid Claimant for his 1975 5 percent disability rating. In other words, the credit shall first be used to reduce the total award before there is an allocation of liability between the Employer/Carrier and the Fund. This has apparently become known as the "Special Fund First Rule."

## ORDER

1. Employer/Carrier shall pay Claimant permanent partial disability compensation in accordance with Section 8(c)(2) of the Act for a 50 percent impairment, based on an average weekly wage of $1,036.67 per week commencing June 1, 2001, and continuing for 144 weeks; provided; however, that a credit for the actual amount of money that Claimant was paid for his 1975 5 percent impairment shall be used to reduce this award, and provided, further, that after first crediting that award the Fund shall be liable for the permanent partial disability compensation payments in excess of 104 weeks;[4]

[4] The exact amount of money received by Claimant for his 5 percent disability in 1975 must be determined by the District Director, for that exact figure has not been stipulated to by the

2. Employer/Carrier shall receive a credit for all benefits previously paid by Employer/Carrier to Claimant;

3. Employer/Carrier shall pay interest on all of the above sums determined to be in arrears as of the date of service of this ORDER at the rate provided by in 28 U.S.C. §1961 and *Grant v. Portland Stevedoring Co.*, 16 BRBS 267 (1984);

4. Counsel for Claimant, within 20 days of receipt of this ORDER shall submit a fully supported fee application, a copy of which must be sent to opposing counsel who shall then have 10 days to respond with objections thereto. *See* 20 C.F.R. §702.132.

5. All computations of benefits and other calculations which may be provided for in this ORDER are subject to verification and adjustment by the District Director.

So ORDERED this 19th day of February, 2003, at Metairie, Louisiana.

A

C. RICHARD AVERY
Administrative Law Judge

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parties and I have not found it to be available in the evidence presented.